Supreme Court, U.S.
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No. 03-643

In the
Supreme Court of the United States

SOLOMON LANGMAN,

Petitioner,

v.

EMANUEL LAUB, JAMES JOHNSON, MEL WEITZ, HAROLD FRIEDMAN, JON GREENFIELD, SAM PELTZ, MANUEL MONACO, HECTOR TORRES and SIDNEY BLUMGOLD, trustees of Local 338 Retirement Fund; RETAIL, WHOLESALE AND CHAIN STORE FOOD EMPLOYEES UNION RETIREMENT TRUST BOARD OF TRUSTEES, Administrator of Local 338 Retirement Fund; and LOCAL 338 RETIREMENT FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRIEDMAN & WOLF
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500

Attorneys for Respondents

EUGENE S. FRIEDMAN
Counsel of Record
WILLIAM K. WOLF
ERINN WEEKS WALDNER

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INTRODUCTION

Respondents, the Trustees of the Local 338 Retirement Fund (the "Trustees") and the Local 338 Retirement Fund (the "Plan") (collectively, "Respondents" or "Defendants"), submit this brief in opposition to Petitioner Solomon Langman's ("Langman" or "Petitioner" or "Plaintiff") petition for writ of certiorari.

The Trustees respectfully request that the Court deny the petition because, under any of the standards applied to conflicting terms from a summary plan description ("SPD"), Petitioner gains nothing from Supreme Court review. Petitioner bases his challenge on the terms of the 1984 and 1994 SPDs, but these terms had no impact upon the benefit he accrued upon his return from a separation from service from 1974 to 1979. Further, as explained herein, Langman received all of the benefits to which he was entitled.

Petitioner also challenges the Court of Appeals' interpretation of the anti-backloading provisions of the Employee Retirement Income Security Act ("ERISA") at 29 U.S.C. § 1054(b)(1)(B). Petitioner's claim that the court below did not properly interpret the statute simply does not warrant the exercise of this Court's supervisory power. As such, the Court must deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondents accept the background as presented by the Court of Appeals in *Langman v. Laub*, 328 F.3d 68, 69-71 (2nd Cir. 2003), as an appropriate Statement of the Case. *See* Petition for a Writ of Certiorari ("Pet.") Appendix ("Pet. App.") at 2a-6a.

Respondents note the following mistakes of fact and law in the petition for writ of certiorari. First, Langman's pension at retirement was not "significantly reduced." *See* Pet. App. at 2. To the contrary, Langman received the entire benefit to which he was entitled. *See* Pet. App. at 7a-9a. Further,

Petitioner assumes a fact not established in this case and not a part of the holding in this case, namely, that the plan document and the SPD conflict. *See* Pet. at i (Question Presented), 6-7. Rather, as the Court of Appeals stated, "none of the Summary Plan Descriptions that were made available to employees between 1984 and 1996 informed Plan participants who had previously suffered a separation that they would be subject to a pro rating of their benefit rates." Pet. App. at 8a. Petitioner fails to note the potentially differing result of an "omission" (Pet. App. at 8a) from an SPD from a "conflicting term" in an SPD (Pet. at i).

As discussed below, Petitioner mistakenly characterizes the Sixth Circuit's decision in *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134 (6th Cir. 1988). The Court's comment that neither prejudice nor reliance are required is mere dicta. *See Edwards*, 852 F.2d at 137.

Finally, Petitioner mistakenly asserts that the Court of Appeals "flippantly dismissed petitioner's statutory analysis" and "disregarded" established rules of statutory construction, as stated in greater detail below. The Court properly applied the anti-backloading provision at 29 U.S.C. § 1054(b)(1)(B).

REASONS TO DENY THE PETITION

I. THE COURT MUST DENY CERTIORARI BECAUSE THE OPERATION OF THE WRIT "WOULD ACCOMPLISH NOTHING"

A. The Terms Of The Challenged SPD Are Inconsequential Because The SPD Post-Dated Langman's Separation From Service

The Court of Appeals correctly affirmed the District Court's finding that Langman was not prejudiced by the SPD's failure to mention the separation provisions. As held by the Court of Appeals:

> While Langman makes several other arguments — all of which we have carefully considered, and rejected — the only other one deserving mention is his claim that none of the Summary Plan Descriptions that were made available between 1984 and 1996 informed Plan participants who had previously suffered a separation that they would be subject to a pro rating of their benefit rates. But Langman has failed to show how he was prejudiced by this omission. Indeed, at the time he separated from service, the benefit rate was $5, and under defendants' calculation he received the significantly higher benefit rate of $20 for the pre-separation period. After he returned, he received all subsequent benefit increases for his post-separation employment. Thus, the failure to inform him of the freeze at no point prejudiced him. *See Veilleux v. Atochem N. Am., Inc.*, 929 F.2d 74, 76 (2d Cir. 1991) (denying plaintiffs recovery for a disclosure violation where they suffered no "cognizable prejudice").

Pet. App. at 8a-9a. Langman incurred his separation from service from 1974-1979. *See* Pet. App. at 12a. Thus, as the Court of Appeals explains, the contents of the SPDs between 1984 and 1996 made no difference whatsoever to Langman's service and the calculation of his benefit.

The question presented by Petitioner does not warrant Supreme Court review because, regardless of the standard applied, neither the terms of the 1994 SPD nor of the 1984 SPD could affect the calculation of Langman's benefit as of the date of his return to covered employment in 1979. *See* Pet. App. at 8a-9a; 20a-21a. The well-settled rule is that:

> A writ of certiorari will be granted only where some useful purpose may be accomplished. It will not lie where some great public detriment or inconvenience is likely to result from interfering with the proceeding of the inferior tribunal, where the subject matter of the

> litigation has ceased to exist, where there is nothing to review, where operation of the writ would be vain and useless, unavailing, futile, or would accomplish nothing or amount to no more than an idle gesture, or where the action of the inferior tribunal sought to be reviewed is correct. The writ does not lie where there is no actual controversy between the parties, or where the issues are hypothetical, abstract, academic, or moot. Certiorari will be denied where the controversy has been settled or the petitioner has received all the relief to which he would be entitled, and will not issue to review a judgment which has been voluntarily satisfied. However, if the judgment has been satisfied under legal compulsion and not voluntarily, the judgment may be reviewed on certiorari.

14 Am. Jur. 2d Certiorari § 13.

Langman maintained throughout these proceedings that the SPD (namely, the 1994 SPD), violated ERISA's disclosure requirements by failing to inform him of the separation provisions. *See* Pet. App. at 19a-20a. Langman claims that because the SPD omitted the effect of the separation provisions on his benefit, he should get benefits greater than those provided under the plan document.

However, as both the Court of Appeals and the District Court correctly explained, even if the SPD disclosed in detail the effect of the separation provisions, it would make no difference in the calculation of Langman's benefit. *See* Pet. App. at 8a-9a; 20a-21a. "The Trustees amended the Plan in 1984 to include the separation provision, five years after plaintiff had returned to covered employment." Pet. App. at 20a. The SPDs between 1984 and 1996 simply have no effect on the years of his separation, namely, 1974-1979. In short, "plaintiff would have been in the same position even if the Trustees had included a description of the separation provision in the 1984 SPD." Pet. App. at 20a-21a. Petitioner

incurred his separation years before the 1984 SPD, and at no time did the Plan decrease his accrued benefit. *See* Pet. App. at 8a-9a, 14a-15a.

In sum, if the Court were to find that the proper standard is prejudice, detrimental reliance or no prejudice or reliance, it would make no difference. There is no basis for changing Langman's benefit rate for his pre-separation from service years (pre-1974) based upon an omission in an SPD from his latter years of service (1984 or 1994). *See* Pet. App. at 8a-9a. Therefore, the Court must deny certiorari.

B. Petitioner Has Received All The Relief To Which He Is Entitled

The Court must deny the petition for a writ of certiorari because Petitioner already has received all of the benefits to which he is entitled. Langman retired effective May 1996. *See* Pet. App. at 3a. At that time, the Trustees determined that Langman was eligible for an unreduced early retirement pension and that he had incurred a separation from employment for the period of 1974 through 1979. As such, in accord with the terms of the Plan, the Trustees applied the $5 benefit rate in effect at the time Langman separated from service. *See* Pet. App. at 4a. However,

> after realizing that the pro rata formula for employees who had previously separated was not introduced into the Plan until 1984, and that use of the $5 rate would therefore retroactively diminish Langman's benefit in violation of ERISA, defendants increased the benefit rate for the pre-separation period to $20, i.e., the benefit rate in effect when the separation provision was first introduced in 1984.

Pet. App. at 4a-5a. The Trustees thus calculated Langman's pension amount by applying the rate in effect in 1984 to Langman's years of service before his separation from employment and applying the rate in effect at the time

Langman retired to the years of benefit service that he earned after his return to covered employment as required by the terms of the Plan, Article V, Section 7. *See* Pet. App. at 4a-5a.

The District Court held, and Langman does not now dispute, that the Trustees did not decrease Langman's accrued benefit for years prior to 1984. *See* Pet. App. at 14a-15a. As the Court of Appeals explained,

> Indeed, at the time he separated from service, the benefit rate was $5, and under defendants' calculation he received the significantly higher benefit rate of $20 for the pre-separation period. After he returned, he received all subsequent benefit increases for his post-separation employment.

Pet. App. at 8a-9a. Thus, Langman received all of the benefits to which he is entitled.

Accordingly, because Petitioner can gain nothing from Supreme Court review of the instant case, the Court must deny certiorari.

C. The Third Circuit's Deviant Decision In *Burstein* Does Not Warrant A Grant Of Certiorari In The Instant Case

Petitioner attempts to make much of a "circuit split" over whether a plaintiff must plead or prove detrimental reliance or prejudice in order for the terms of an SPD to prevail over the terms of the Plan document. *See* Pet. at 4-5, n. 2. First, the decision of the Third Circuit in *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, 334 F.3d 365 (3rd Cir. 2003) is not applicable here because Petitioner failed to show a conflict in terms between the Plan and SPD at issue. *See* Pet. App. at 8a-9a; 19a-20a. Second, on its face, the decision in *Burstein*, *supra*, is inapposite to this case.

Only the Court of Appeals for the Third Circuit has held that a plan participant who claims benefits owed on the basis of the terms of the SPD "does not need to plead reliance or prejudice. . . ."[1] *See Burstein*, 334 F.3d at 380. In *Burstein*, the court first held that the conflict between the SPD and the plan document was "unquestionably material." *Id.* at 379. After having found a material conflict, the court continued by holding that the plan is a "contract" whose terms are "superceded and modified by conflicting language in the SPD." *Id.* at 381.

As the District Court in the instant matter found, "it is undisputed that the 1994 SPD, the only version provided by the parties, does not refer to the separation provision or its potential effect on plaintiff's benefits." Pet. App. at 20a. ERISA plans are required to provide a summary plan description to advise the participants of the major provisions of the Plan. *See* 29 U.S.C. § 1022(a). This requirement "is not intended, however, to undercut the flexibility essential to effective and responsible financial management of the plan which Congress intended when it adopted for ERISA fiduciaries the 'prudent man' standard." *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914 (2d Cir. 1982). The Plan need not contain detailed schedules and enumeration of factors on which the fiduciaries make their determination because "such a requirement would defeat the purpose of a summary, i.e., a brief restatement." *Id.* at 914; *see also Morse v. Stanley*, 732 F.2d 1139, 1148 (2d Cir.

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[1] The Sixth Circuit's fifteen year old statement in *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988), that "[although in the instant case, appellee relied to his detriment upon the language of the Summary, . . . existing precedent does not dictate that a claimant who has been misled by summary descriptions must prove detrimental reliance" is mere dictum. *See Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992) ("the statement is dictum because the *Edwards* court found that the beneficiary in that case reasonably relied on the summary plan description.")

1984). There simply is no finding here that the omission of the separation provisions resulted in a "material conflict" as required under *Burstein*.

Further, *Burstein* relied on inapposite Second Circuit precedent. *See Burstein*, 334 F.3d at 380-82. Specifically, the *Burstein* court relied on *Feifer v. Prudential Ins. Co. of America*, 306 F.3d 1202 (2d Cir. 2002), in which the court stated that it was "unaware of caselaw to the effect that a plaintiff must show reliance or prejudice to enforce terms of a plan." *Feifer*, 306 F.3d at 1202; *Burstein*, 334 F.3d at 381. Of course, the *Feifer* decision referred to a demonstration of prejudice or reliance when enforcing the terms of the plan document itself, as opposed to the SPD. *See Feifer* 306 F.3d at 1202.

Moreover, the Petitioner could not prevail under any of the theories espoused by the various circuits. Langman did not plead or prove either prejudice or detrimental reliance. For the reasons explained above and by the courts below, even if the challenged SPD had included a detailed explanation of the separation provision, it would not have altered Langman's benefit in any way. Thus, under *Burstein* the omission from the SPD is immaterial and simply irrelevant.

Accordingly, the Court must deny the petition for a writ of certiorari.

II. THE COURT OF APPEALS' INTERPRETATION OF THE ANTI-BACKLOADING PROVISIONS OF ERISA DOES NOT WARRANT A GRANT OF CERTIORARI

The second "question presented" by Petitioner, despite its dramatic slant, does not rise to the level of a "compelling reason" (Sup.. Ct. R. 10) worthy of the Court's grant of a writ of certiorari. (*See* Pet. at i, Questions Presented). The Court of Appeals' interpretation of the anti-backloading provisions of ERISA did not cause the Second Circuit to

"so far depart[ ] from the accepted and usual course of judicial proceedings, or sanction such a departure by a lower court, as to call for an exercise of this Court's supervisory power." *See* Sup. Ct. R. 10(a). Rather, the Court of Appeals held that the Trustees determined Langman's benefit in accord with the terms of the plan and not in violation of the anti-backloading provisions of ERISA. *See* Pet. App. at 5a-7a. Langman's proffered interpretation of that statute squarely contradicts the statute's language and history, as well as the interpretation of the Second Circuit Court of Appeals, and simply does not warrant review by the Supreme Court. *See* Sup. Ct. R. 10(a) and (c).

Petitioner erroneously argues that the Court of Appeals' citation to legislative history results in a "disregard" of "established rules." *See* Pet. at 8. Petitioner's claim that the Court "flippantly dismissed petitioner's statutory analysis" is unwarranted. *See id.* Here, the Court of Appeals thoughtfully analyzed ERISA § 204(b)(1)(B)(i)-(ii) and issued its decision accordingly. *See* Pet. App. at 2a-9a.

The instant decision is in accord with the statutory language as well as its history and purpose. *See* Pet. App. at 5a-7a. Petitioner, not the Court of Appeals, ignores the plain meaning of the statute and, instead, argues that all benefit increases that apply to previous years of service must be 100 percent retroactive to all years of service. *See* Pet. at 9-10. The result Plaintiff advocates would paralyze pension plans' attempts to increase benefits and is contrary to not only the history of the backloading provision, but also to its plain language. *See* Pet. App. at 5a-7a.

In order to make it possible for plan sponsors to increase benefit rates without violating the backloading provision, ERISA § 204(b)(1)(B) provides:

> (i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;
>
> (ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded.

29 U.S.C. § 1054(b)(1)(B)(i), (ii); *see* 26 C.F.R. 1.411(b)-1(b)(2)(ii)(A), (B); Pet. App. 31a, 35a-36a.

Thus, Section 204(b)(1)(B) exempts across the board unit benefit rate increases from the comparative test, because the rate "in effect for the current year" (e.g., $50 for Langman's benefit calculation in 1996) shall be treated "as in effect for all other plan years." *See* 29 U.S.C. § 1054 (b)(1)(B)(i). The benefit rate in effect when Langman ceased work in covered employment is irrelevant to test the accrual rate at the 1996 snapshot in time. In 1996, when Langman retired, he and every other participant that year accrued benefits at the rate of $50 (regardless of their years of service prior to 1996).

Thus, the instant plan does not unlawfully backload benefits on the basis of years of service, which is the evil Congress meant to address with Section 204(b). *See* Pet. App. at 5a-7a. Neither Langman, nor any other participant in the Local 338 Plan, was penalized based on his length of service, such that he would only accrue significant benefits in the latter part of his service. *See, e.g., Jones v. UOP*, 16 F. 3d 141, 143 (7th Cir. 1994). Benefit rates increased over time, and Langman's benefits increased.[2] Langman accrued benefits prior to 1984 in accordance with the rates in effect

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[2] Langman ignores the reality that "the trustees could freeze the plan by completely eliminating any future accrual or increase of benefits under the plan." *LaBrosse v. Trustees of the Asbestos Workers Local 47 Retirement Trust Plan*, 186 F. Supp.2d 791, 795 (W.D. Mich. 2001).

at that time. *See* Pet. App. at 4a-5a. The manner in which his benefits were ultimately calculated was consistent with the Plan and in accordance with ERISA.[3]

Accordingly, Langman's petition does not meet the difficult test for granting a writ of certiorari. This matter demands repose, and Respondents respectfully request that the Court deny the instant petition and lay this issue to rest.

CONCLUSION

For the reasons stated above, the Court should deny Langman's petition for a writ of certiorari.

Respectfully submitted,

EUGENE S. FRIEDMAN
Counsel of Record
WILLIAM K. WOLF
ERINN WEEKS WALDNER
FRIEDMAN & WOLF
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500

Attorneys for Respondents

[3] Langman's argument would have the negative effect of barring all benefit increases unless they were one hundred percent retroactive, regardless of when or whether a participant ceased work in covered employment. *See* Pet. App. at 7a.